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No. 10-281

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In The
Supreme Court of the United States

JEROME K. LANNING, et al.,

Petitioners,

vs.

PATRICK PILCHER, et al.,

Respondents.

On Petition For A Wr[illegible]f Certiorari To The Florida First District Court Of Appeal

PETITIONERS' REPLY BRIEF

WILLIAM M. SLAUGHTER
Counsel of Record
HASKELL SLAUGHTER YOUNG & REDIKER, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203
Tel: 205-251-1000
wms@hsy.com

MARK D. HESS
HASKELL SLAUGHTER YOUNG & REDIKER, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203

DOUGLAS S. LYONS
LYONS & FARRAR
325 N. Calhoun Street
Tallahassee, FL 32301

SUSAN L. KELSEY
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun Street
Tallahassee, FL 32301

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The various Response briefs filed by Respondents in this case represent a mishmash of confusion, misstatements of law, mischaracterizations of the arguments set forth in the Petition, and a number of internal inconsistencies.[1] However, there are a number of points raised by Respondents which do require discussion.

At no point do Petitioners argue that SOHA is unconstitutional because there is a durational requirement that a person must reside in Florida for six months before he or she can claim homestead status and benefit from the SOHA assessment cap. Rather, Petitioners simply make the common-sense observation that a person who lives in Florida for less than most of the time (i.e., less than half of the year) cannot be a permanent resident, and cannot avail himself or herself of the SOHA cap. Furthermore, there still remains an issue of fact as to how the

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[1] A total of four Response briefs were filed on behalf of the following Respondents: (1) Timothy Smith, as Property Appraiser of Okaloosa County, Florida, and Chris Hughes, Tax Collector for Okaloosa County, Florida, and the City of Destin (the "Smith Brief"); (2) Florida Department of Revenue (the "State Brief"); (3) Okaloosa County, Okaloosa County School Board, Walton County, and Walton County School Board (the "County Brief"); and (4) Patrick Pilcher, Walton County Property Appraiser, and Rhonda Skipper, Walton County Tax Collector (the "Pilcher Brief"). The Pilcher Brief devotes approximately half of its substantive text to arguing that SOHA does not violate Equal Protection or 42 U.S.C. § 1983, issues not raised in the Petition.

Florida Department of Revenue actually determines permanent residency, so there may in fact be a durational component that is not yet clear. Furthermore, it is fundamental that Petitioners do not wish to be permanent residents of Florida. If they did so wish, then they could make the necessary changes in their status to accomplish that goal, thereby gaining the SOHA benefit, and obviating the reason for this lawsuit. Frankly, after reviewing the various Response briefs, Petitioners are left wondering whether Respondents have spent the last three years litigating the same case as Petitioners.

ARGUMENT

I. Petitioners are grateful for Respondents' acknowledgement that no factual record has thus far been created.

Respondents argue that "Petitioners' speculation that this statute has affected the housing market adversely is unfounded and unsupported by any evidence in the record or elsewhere." State Brief, at p. 11. Petitioners were never given the opportunity to establish a factual record, as their case was dismissed for failure to state a claim. Petitioners simply did not have the opportunity to prove any of the facts that would support their claims, though Petitioners are confident that they can show the following:

- that, as a result of Florida's unique geographical appeal, the majority of second

homes in Florida are owned by nonresidents;

- that, as a result of the tax benefits afforded to homesteaders, SOHA has an enormous impact on interstate commerce;
- that homesteaded Floridians who also own a second home receive preferential treatment over similarly situated nonresidents because state services, notably the FEFP, are heavily subsidized by tax revenue collected from nonresident homeowners.

II. *Nordlinger* is neither dispositive of, nor relevant to, the arguments raised in the Petition.

Respondents are uniform in their contention that SOHA passes constitutional muster under this Court's analysis in *Nordlinger v. Hahn*, 505 U.S. 1 (1992). However, Respondents completely ignore the fact that *Nordlinger* was decided *solely* on Equal Protection grounds. As Petitioners are arguing that SOHA is unconstitutional as a violation of the Privileges and Immunities Clause, the dormant Commerce Clause, and the Right to Travel, it is unreasonable to conclude that *Nordlinger*, which, as acknowledged by Respondents, deals only with an Equal Protection challenge, controls the case *sub judice*. The Florida Department of Revenue has tried to sidestep this fatal logical flaw by making the rather specious argument that "the equal protection analysis . . . by this

Court in *Nordlinger* nevertheless informs the analysis of the remainder of the constitutional claims that petitioners do assert." State Brief, at p. 7, n. 3. Respondents' naked reliance on a case which has nothing to do with the arguments set forth in the Petition clearly demonstrates the complete absence of viable counterarguments available to Respondents in this case.

III. Respondents have obfuscated how SOHA discriminates against interstate commerce.

In their various opposition briefs, Respondents repetitively contend that the SOHA assessment cap does not discriminate against nonresident owners of second homes because of the facially equal denial of the cap to second homes owned by Florida residents. Second homes are claimed to be taxed equally whether owned by residents or nonresidents. With respect to the national real estate market in which Florida plays a disproportionately large role because of its climate and recreational uniqueness, Respondents' argument obfuscates two aspects of the SOHA scheme that are inconsistent with this Court's dormant Commerce Clause jurisprudence. First is the use of a very small amount of facial equality among resident and nonresident second homeowners to justify a comparatively enormous amount of economic inequality between residents and nonresidents in the Florida real estate market. The dismissal of this case on the pleadings has prevented Petitioners from

developing an evidentiary record that would show that the number and value of second homes owned by Florida residents is extremely small in relation to the number and value of second homes owned by non-residents, setting up the situation recognized in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." *Id.* at 200. This condition identifies a realm of uncertainty and inconsistency among relevant state court decisions, namely, the extent to which a discriminatory tax that distorts interstate commerce may be imposed on nonresidents because of the protective rationale that the same tax is imposed upon a small and politically neutralized group of residents.

The second aspect of the SOHA scheme that Respondents attempt to obfuscate is the economic reality of the subsidy received by resident second homeowners through the operation of the Florida Education Finance Program ("FEFP"), which reduces the property taxes on the primary homes that such second homeowners would otherwise be obligated to pay. While this subsidy may not equal the full tax difference between a primary home and a second home of equal market value, it nevertheless significantly reduces the aggregate tax burden of the resident second homeowner on the two homes that he

owns and thereby negates the claimed facial equality of the tax burden between the resident and nonresident owners of second homes. Florida requires each school district to levy a property tax at a millage rate determined by the Commissioner of Education, which is calculated to yield the local portion of the FEFP funding requirement for that school district. The difference between the total district funding requirement and the local tax yield for the district is provided by the State from general revenues principally provided by the state sales tax. The district property tax yield and the state funding portion are reciprocal; to the extent one is reduced, the other must be increased to meet the total FEFP requirement for the district. In resort districts along the coast where the great majority of nonresident homes are concentrated, the higher property taxes yielded by the absence of the SOHA assessment cap on second homes reduces the state portion of the FEFP funding requirement for such districts and frees up state revenues that can then be used to reduce the property taxes of school districts that are not blessed with a relative plentitude of second homes owned by nonresidents.

If a Florida resident owns both a primary home and a second home located in a district benefited by the presence of nonresident second homes, he pays a tax on the second home equal to that paid by nonresidents, but his primary home in that district is subject to the SOHA cap and benefits from a millage rate that is set lower because of the high tax yield

from the second homes not subject to the SOHA assessment cap. If a Florida resident owns a second home in a district containing a concentration of second homes not subject to the SOHA cap, but his primary home is located in an interior district containing significantly fewer second homes taxed at higher assessments permitted by SOHA, then his primary home will benefit from a lower millage rate made possible by state revenues liberated from the need to supplement the higher property taxes generated by the higher assessment districts. Finally, if a Florida resident owns both a primary home and a second home in a district containing significantly fewer second homes than the resort districts, even though the assessment on his second home will not be subject to the SOHA cap, he will pay a millage rate on both homes less than the rate that would apply if state revenues were not available to reduce the district property tax that would otherwise be necessary to meet the FEFP funding requirement. Thus, in every situation the resident second homeowner receives a reduction or indirect rebate of property taxes that is not available to the nonresident owner of a second home discriminatorily taxed at full market value.

In *West Lynn Creamery*, *supra*, this Court protected out-of-state milk producers against the discriminatory efforts of a facially equal tax on both in-state and out-of-state milk producers conjoined with a subsidy to the in-state producers funded from the tax payable by all producers. "By conjoining a tax

and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone." *Id.* at 199. In this case, Florida attempts to justify its tax discrimination against nonresidents' participation in the state residential real estate market by claiming that any burden on interstate commerce is outweighed by Florida's interest in protecting the stability of home ownership. Likewise, in *West Lynn Creamery* – and as recognized in many other cases therein reviewed – this Court has consistently rejected the argument that the protection of particular state social or economic benefits outweighs the national freedom from parochial tax discrimination promised by the dormant Commerce Clause. As this Court recognized, "to accept these arguments, we would make a virtue of the vice that the rule against discrimination condemns." *Id.* at 205.

Declining to accept the breadth of the rationale adopted by this Court in *West Lynn Creamery*, Justice Scalia, joined by Justice Thomas, concurred in the result based on the rationale that "I will, on *stare decisis* grounds, enforce a self-executing 'negative' Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court." *Id.* at 210. Justice Scalia then analyzed four possible devices that could produce the economic result condemned in *West Lynn Creamery* and among these he identified "a nondiscriminatory tax upon the industry, the revenues

from which are placed into a segregated fund, which fund is disbursed as 'rebates' or 'subsidies' to in-state members of the industry (the situation at issue in this case [*West Lynn Creamery*])." *Ibid.* He concluded that a discriminatory subsidy derived from a segregated fund supplied by the facially nondiscriminatory tax fell within the *stare decisis* boundaries of the Court's dormant Commerce Clause jurisprudence. Even under the more limited rationale advanced by Justice Scalia in *West Lynn Creamery*, the SOHA tax and subsidy scheme violates the free market safeguards of the dormant Commerce Clause. The property taxes levied with facial equality on second homes at the higher SOHA assessment go into a segregated school tax fund. While no portion of such taxes derived from nonresident second homes are directly distributed to resident owners of second homes, such nonresident taxes directly offset state taxes that are used all over the state to reduce the property taxes that would otherwise be payable by the resident owners of primary homes, including those who also own second homes. The "subsidy" is not economically derived from general state taxes since no funds from such source would be available to reduce primary home property taxes were it not for the segregated additional nonresident second home taxes that are used to offset the FEFP need for general state taxes.

Whether as the result of not understanding this conjoined tax and subsidy argument or evading it

through deliberate mischaracterization, Respondents attempt to answer it by claiming that Petitioners contend that "the ad valorem taxation of their property is not fairly related to the services provided by the State . . . " County Brief, at p. 17. That argument of Respondents is nothing more than a canard or, perhaps more charitably, a straw man which lacks even the threshold verisimilitude normally associated with that forensic ploy. Although a common sense appraisal readily shows that residents derive proportionately greater benefits than nonresidents from taxes paid under the discriminatory SOHA scheme, Petitioners recognize, and have never contended otherwise, that a disparity in benefits constitutes a questionable basis for challenging discrimination under the dormant Commerce Clause. Petitioners' challenge has been consistently directed to the unequal tax burden on their property as a result of the tax and subsidy scheme and not to any claimed disparity in the common services and protections which are the sinews of modern society.

IV. The asserted public policy behind SOHA is entirely pretextual.

All Respondents put great stock in the asserted public policy of SOHA: that it protects the traditional homestead from the ravages of the free market. Petitioners do not dispute that the homestead exemption provided by SOHA was created for that purpose; many other states have similar homestead exemptions which are intended to offer some shelter to the

traditional family home. However, Respondents' contention that the SOHA cap is solely to protect the homestead cannot be maintained in the face of the State's own policy commonly referred to as the "recapture rule." As explained by one Respondent:

> [I]n a down market, the Florida Department of Revenue's "recapture rule" requires property appraisers to increase the assessment by either three percent or the percentage change in the Consumer Price Index in any year that the property's just value exceeds its assessed value, regardless of whether there has been an increase in just value.

County Brief, at p. 16 (citing Fla. Admin. Code R. 12D-8.0062). In other words, when the Florida real estate market is "up," the homestead is protected. However, when the market is "down," Florida has implemented a taxation scheme where property taxes are raised even in the face of falling property values. It has done so to pay for the services which were previously paid by the excess taxes of nonresident property owners. Such a scheme can hardly be said to be for the purpose of protecting the family home in the face of rapidly increasing property values and tax liabilities.

V. There is no authority for the position that *Pike* is inapplicable to tax cases.

Respondents argue that Petitioners are not entitled to subject SOHA to the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), for

the simple reason that *Pike* does not apply to taxation cases. See, e.g., County Brief, at pp. 23-24; State Brief, at pp. 13-14. However, Respondents cite no authority that supports this argument. In fact, the State acknowledges that it is at least an "open question" as to whether *Pike* applies to tax cases, but goes on to argue that it does not "because courts are 'professionally untrained' to make the kinds of factual determinations necessary in such situations." State Brief, at p. 14. Why the Court is "better trained" to make the kinds of factual determinations necessary in a regulatory context is not something that Respondents have endeavored to explain. Furthermore, the First DCA *did* apply the *Pike* balancing test when it first reviewed the exemption aspect of the SOHA scheme in *Reinish v. Clark*, 765 So. 2d 197, 214 (Fla. 1st DCA 2000).

Petitioners respectfully submit that this case, consisting solely of a challenge to a taxation scheme, which was dismissed for failure to state a claim and without a factual hearing of any kind, which otherwise will evade federal court review, in which the *Pike* test was not conducted, and in which Petitioners contend that they will be able to demonstrate a significant burden on interstate commerce resulting from the SOHA scheme, presents an ideal opportunity for this Court to settle the issue of whether *Pike* applies to taxation cases.

VI. Respondents' standing arguments are without merit.

Respondents argue that Petitioners lack standing to argue certain aspects of the Right to Travel, namely that SOHA discourages relocation from Florida. See, e.g., County Brief, at p. 15. Petitioners are not without standing to make this argument as they are homeowners, and are "locked-in" to their purchases, as discussed in detail in the Petition. Furthermore, SOHA has an identifiable effect on the price others may pay to purchase these same homes. In fact, one Respondent claims: "[a]ny impact that the SOHA has on the decision of owners of homestead property to relocate outside of Florida would be negligible." County Brief, at p. 15. Without some sort of factual hearing to establish the impact of SOHA, no credence can be given to any claim that such an impact would be negligible.

CONCLUSION

Petitioners request that this Court issue its writ of certiorari to the Florida First District Court of Appeal.

Respectfully submitted,

WILLIAM M. SLAUGHTER
Counsel of Record
HASKELL SLAUGHTER YOUNG
& REDIKER, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203
Tel: 205-251-1000
wms@hsy.com

MARK D. HESS
HASKELL SLAUGHTER YOUNG
& REDIKER, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203

DOUGLAS S. LYONS
LYONS & FARRAR
325 N. Calhoun Street
Tallahassee, FL 32301

SUSAN L. KELSEY
KELSEY APPELLATE
LAW FIRM, P.A.
115 N. Calhoun Street
Tallahassee, FL 32301

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Attorneys for Petitioners